No. 10312.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MACCO CONSTRUCTION COMPANY, a corporation,

Appellant,

vs.

A. L. FARR, R. P. SINCLAIR and YOUNG & SON CO., LTD., a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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Unless otherwise noted all references herein are to pages of the printed transcript of record.

I.

Statement of Pleadings.

This case originated with the filing of a complaint in the Superior Court in the State of California, in and for the City and County of San Francisco.

The complaint alleged that on or about the 3rd day of December, 1940, the defendants entered into an oral contract with plaintiffs whereby the latter agreed to furnish four automobile trucks and the personal services of plaintiffs in the operation of the same, and the defendants

agreed to hire the exclusive personal services of said plaintiffs and said truck equipment for the entire duration of a certain grading and excavating project of the defendants; that on or about the 18th day of January, 1941, the defendants, without cause, discharged the plaintiffs and refused to allow the plaintiffs to continue performance of the said contract, and that thereby the plaintiffs were damaged in the sum of $6700.00 as set forth in said complaint.

On motion of the defendants Macco Construction Company, said cause was removed to the District Court of the United States, Northern District of California, Southern Division, upon the ground that a separate controversy existed between the plaintiffs and Macco Construction Company, and that a diversity of citizenship existed between the plaintiffs and said defendant.

The defendant Macco Construction Company, hereinafter referred to as the "defendant," filed its answer admitting that on or about the 3rd day of December, 1940, it entered into an oral agreement with the plaintiffs whereby the plaintiffs agreed to furnish four automobile trucks and the personal services of the plaintiffs in the operation of the same, and that it agreed to hire the personal services of the plaintiffs and said truck equipment. The answer, however, denied that the agreement was for the hiring of said or any trucks, or said or any personal services for the entire duration of said project or for any other specified time. The answer alleged that the agreement for the hiring of said trucks and said personal services was merely for such time as the defendant desired to avail itself thereof in connection with said project. The answer admitted that on or about the 18th day of January, 1941, the defendant ceased to desire to avail itself of said services of the plaintiffs or of said truck equipment and thereupon

terminated the said agreement. The answer denied the damages alleged in the complaint.

As a second, separate defense the answer alleged that the trucks and each of them furnished by the plaintiffs were not in good or serviceable or workable condition, and that the plaintiffs did not maintain them in good, serviceable or workable condition, and that prior to the 18th day of January the plaintiffs breached the said agreement by reason of the defective condition in which they maintained said trucks.

The answer alleged in a third defense that by reason of the defective and unserviceable condition of said trucks the consideration to the defendant for the entering into of the said agreement of hiring failed in a material part.

As a fourth defense the answer alleged that prior to the commencement of the action the plaintiffs had assigned all of their right, title and interest in and to any recovery to which they, or either of them, might be entitled against the defendant, to Young & Sons Company, Ltd., a corporation, and that said corporation was the owner of all such right, title and interest of the plaintiffs, or either of them, and plaintiffs did not have legal capacity to maintain the action.

A jury trial was had. At the conclusion of plaintiffs' case the defendant made a motion to dismiss, which motion was denied [pp. 29-31]. At the conclusion of the trial the defendant made a motion for a directed verdict in its favor, which motion was denied and exception allowed [pp. 201-202]. The jury then returned a verdict in favor of the plaintiffs in the sum of $2500.00 [pp. 201-202].

The defendant then filed its notice of motion under Rule 50 B, Federal Rules of Civil Procedure, to set aside the

verdict and any judgment entered thereon and to have judgment entered in accordance with said directed verdict and in favor of defendant and in the alternative for a new trial. Said motions and each of them were denied [pp. 241-244]. A final judgment was entered in favor of the plaintiffs and against this defendant for $2500.00, plus costs taxed at the sum of $109.25 [pp. 245-246].

Within the time allowed by law this defendant filed its notice of appeal [pp. 247-248].

II.

Jurisdiction.

The jurisdiction of the District Court was based upon diversity of citizenship (28 *U. S. C. A.*, Sec. 41) and the Circuit Court of Appeals has jurisdiction to review the judgment rendered by said District Court. (28 *U. S. C. A.*, Sec. 225.)

III.

Statement of the Case.

(a) Contract of Employment.

The plaintiff Farr testified that having learned that the defendant Macco Construction Company had a contract on what is known as the Bethlehem Steel job, he endeavored to see Mr. Wells of the defendant company but could not do so. However, he and his partner, Sinclair, met Wells at the Palace Hotel the next evening. Wells asked about plaintiffs' equipment. Plaintiffs told him that they had in mind purchasing four Autocar trucks of seven cubic yard capacity but which would handle eight yards; that these trucks were in good condition and had Heil hoists. Wells stated that the employment was to be at the Railroad

Commission rates, that is, $2.70 per hour, and the defendant would take care of the drivers' payroll and compensation insurance. Plaintiffs asked Wells how long the job would last and he said four months or 120 working days. Nothing else was said in reference to plaintiffs' employment except that Wells said the equipment sounded interesting, and that plaintiffs would be welcome to go to work for the defendant on another job after the Bethlehem Steel job was over. This conversation took place in the last part of November, 1940 [pp. 50-53].

Plaintiff Farr further testified that some days later he had another conversation with Wells who said he was not sure how many trucks he would hire but for plaintiffs to contact him in three or four days [p. 53].

Plaintiff Sinclair testified that at their conference with Wells, plaintiff Farr did most of the talking; that he asked Wells if he were interested in renting trucks, explaining that the trucks they had in mind were Autocars having a capacity of almost seven cubic yards, water level; that they asked Wells very directly about the length of the job; that Wells said the job would last four months and assured them that the trucks would work the whole four months; that plaintiffs explained that they were buying the trucks on the strength of the contract with the defendant and would not consider purchasing them unless they were sure of working the trucks the entire four months [pp. 74-75, 76, 79].

Sinclair also testified that at this conversation Wells said that the defendant's trucks were going to be in San Diego; that he was glad to get the plaintiffs' trucks and asked them if they knew anyone else who had any idle trucks; that Wells assured them that the trucks would

work the whole four months and that when the job was over plaintiffs could follow defendant around as it had many jobs all over the coast [pp. 76-79]; and that at that time plaintiffs had a guarantee with them in the sum of $750.00 per month which Wells promised to sign if the amount were changed from $750.00 to $500.00 per month [pp. 76-77].

Sinclair, however, also testified that at this conversation Wells stated he probably would be interested in renting plaintiffs' trucks as soon as he learned whether or not Macco's trucks were going to San Diego [p. 75]. He testified that Wells said he was interested in plaintiffs' trucks and to contact him in a few days [p. 75].

Plaintiff Sinclair testified that he did contact Wells in a few days but that Wells again would not give him a final answer [p. 75].

Plaintiff Sinclair testified that later Wells did give them a final answer, telling them that they could consider themselves hired [p. 76].

Plaintiff Sinclair testified that they took the guarantee changed to $500.00 per month to Wells who said he had not the authority to sign it but that subsequently, and a few days after the last above conversation, Wells did sign an acceptance of an assignment, which then read for $875.00 a month [Ptf. Ex. 3. pp. 76, 77, 78].

Witness Wells, the construction superintendent of the defendant, testified on a deposition taken by plaintiffs, that he hired some trucks from the plaintiffs and that he thinks he told them that the job would take about sixty days; that, however, it was not until they brought in a guarantee that he knew they were buying the trucks; that they then told him they were going to buy the trucks for that par-

ticular job and how much they were going to pay for them; that he told them that they could not make that much out of the job; that they brought a guarantee for him to sign and he told them he would not and did not have the authority to sign it [pp. 178, 179-180, 181, 187-189]. He testified positively that plaintiffs were not hired for any definite period of time [p. 191]. He testified that the job actually lasted 54 to 55 working days [p. 187].

(b) The Assignment to Young & Sons.

The assignment by plaintiffs to Young & Sons was an assignment of $3500.00 of the first moneys due plaintiffs from defendant. It was to be paid at the rate of $875.00 per month commencing January 4, 1941. It was coupled with an authority and a request to the defendant to make such payments to Young & Sons [pp. 232-233].

Mr. O'Neil, attorney for Young & Sons, testified that he discussed with Mr. Wells the acceptance of this assignment by the defendant. Wells stated that the defendant would not guarantee any payments to plaintiffs and would accept the assignment only in so far as any money actually became due plaintiffs from defendant [p. 45].

The form of this acceptance is set forth on pages 233-234 of the printed transcript of record and is as follows:

> "We Hereby Accept the foregoing assignment and agree to make the payments at the times and in the amounts specified in said assignment. It Is Distinctly Understood and Agreed, however, that we are obligated to make said payments only out of moneys to become due and payable from us to said A. L. Farr and Robert P. Sinclair, and not otherwise, and that if sufficient moneys do not become due and payable to said A. L. Farr and Robert P. Sinclair to make said

payments, we shall be obligated to make payments only to the extent of the moneys actually due and payable from us to said A. L. Farr and Robert P. Sinclair."

(c) The Terms of the Agreement.

Except as to the question of the duration of the employment there was no dispute in the evidence as to the terms of the agreement entered into between the parties. Farr and Sinclair were to continue to operate their own business and neither was to become an employee of the defendant [pp. 58-101]. They were to be paid Railroad Commission rates, that is, $2.70 per hour per truck for the time the truck actually worked [p. 117], and in addition thereto, the defendant was to pay the wages of the truck drivers at the union scale, namely, $9.00 for seven hours [p. 118].

The defendant was also to advance for plaintiffs' account, plaintiffs' mechanics Workmen's Compensation Insurance premiums and Social Security tax. It also supplied gasoline and everything for the operation of the trucks [p. 62]. All the items mentioned in this paragraph, however, were to be and were charged back to the plaintiffs.

Plaintiffs were to furnish all repair parts and maintain the trucks and to pay for all operating expenses thereof. They also were to furnish their own services at no extra pay [p. 82].

(d) Work Which Was to Be Done.

Again there is no dispute in the evidence as to what constituted the work that was to be done. It consisted of the removal of a hill along the west side of the so-called

Risdon property and required the removal of about 615,000 cubic yards of dirt [pp. 33-34]. At the start 2,000 feet were to be hauled on to the Bethlehem property. The remainder was to be hauled to Western Pacific dump on Third Street and not on the Bethlehem property. This dump was some four thousand feet from the hill which was being removed [pp. 149-150, 155, 166].

The plaintiffs had no permit from the Railroad Commission of the State of California for the hauling of property over any public highway [pp. 120-123].

After the defendant had rested its case and on redirect examination, plaintiff Sinclair testified that when the agreement with the defendant was entered into, Wells stated that the whole job was to be on private property at the Bethlehem Company and that Wells said they were going to put the dirt on barges and take it to Alameda [p. 187].

Plaintiff Farr was not called on redirect and at no time gave any similar testimony.

(e) Condition of Plaintiffs' Trucks.

There is considerable conflict in the evidence as to the condition and serviceability of the plaintiffs' trucks. The plaintiffs and their witness Thiel testified that the trucks were in good condition when received from Young & Sons, when the work on the job started, and when their work thereon was terminated [pp. 54, 66, 68, 81].

However, plaintiff Farr admitted that the trucks were equipped with open cabs without doors [p. 62] and that he had one complaint from the driver that the truck was unsafe because the brakes were in bad condition. He testified that the brakes on this truck were immediately relined [pp. 63-64].

Plaintiffs' witness Thiel testified that just a few of the four trucks required major overhauling and that either one or two of them required the installation of new rear ends [p. 69].

Plaintiff Sinclair admitted that they had quite a lot of trouble with the trucks; that the fan belts, radiator hoses and generators were bad, and that they had to replace these parts; that they also relined the brakes on one truck and had the hoist overhauled [p. 81].

The total price of the trucks was $3500.00 [pp. 224-225], yet plaintiffs spent $700.00 fixing them up and in addition $400.00 for new tires and things of that sort [p. 96].

On the other hand the defendant's witnesses Gearhardt [pp. 124-130], Crawford [pp. 130-134], Meinn [pp. 134-136], Carlson [pp. 137-139], Keenan [pp. 139-140], Burch [pp. 140-142, 143-145], Tucker [p. 150] and Wells [pp. 184-186, 191] all testified that the trucks were in bad condition, were not serviceable and were dangerous to operate.

(f) Work Done on the Job.

The defendant's work was to start on November 16th and to be completed by April 8th. It, however, was not actually started until December 9th and was completed on April 16 [pp. 35, 38, 169]. The complete job took 55 1/6 days, plus eight days of cleaning up time. These latter, however, being short days and only equivalent to three full days [pp. 169-172].

Plaintiffs started work on December 9th [pp. 54, 57, 81].

Plaintiff Farr testified that the trucks were on the job at all times twenty-four hours a day from then on until January 18th [p. 55].

He also testified that trouble developed the first day [p. 59]; that he *thinks* all the trucks worked the first day but didn't know whether the truck known as No. 44 worked that day and didn't know if the trucks worked the next day [pp. 57, 58].

Plaintiff Sinclair testified that the trucks worked seventeen days, working twenty-one hours per day [p. 83], which would amount to 1428 hours. In fact, they only worked 672 hours or considerably less than half that time [pp. 259-260].

The plaintiff Farr testified that he personally put in at least twelve hours a day and sometimes twenty-four hours a day on the job and that either he or plaintiff Sinclair was always on the job. He testified that plaintiff Sinclair devoted the same amount of time to the job as he did [pp. 55, 58].

Plaintiff Sinclair testified to the same effect, stating that he devoted his time to maintenance of the trucks [p. 83].

(g) Termination of Employment.

Defendant's foreman, Burch, testified that on December 9th he had a conversation with either plaintiffs Farr or Sinclair but that he thinks it was with Farr; that he (Burch) told him that the trucks were not in shape and that the defendant couldn't use them in the condition they were in. Plaintiff then said that they were going to work on the trucks and try and get them in shape. The trucks did not work the following day and it was quite a little while before they resumed work [pp. 142-143].

Burch further testified that a day or two later he had another conversation with either Farr or Sinclair in which

they asked him when he was going to let them go back to work and he told them that he didn't know and he didn't think they were going to work any more because they were all done; they then said they had been working on the trucks and had got them back into shape [p. 143]. Burch then testified that a day or so later they again asked him about returning to work and he said he would take it up with Mr. Wells and see if they could go back. He then told them they could go back to work [p. 143].

Defendant's field engineer, Tucker, testified that approximately a week before plaintiffs left the job, plaintiffs stopped him and asked him how much longer they would be on the job, and that he said they wouldn't be on it much longer and he suggested they get in touch with Eaton & Smith, who had just been awarded a contract for work in Richmond. They asked how to get out to see Eaton & Smith and he gave them directions [p. 154]. Tucker testified that on the 18th day of January he told plaintiffs they were through at 3:30 p. m. and that they shrugged their shoulders and said nothing [pp. 155-156]. Tucker testified that about a week later plaintiffs came into the office and wanted to check the hours and amount of money due them from defendant; that defendant had prepared a statement for them and that the plaintiffs went over it with him and he showed them how many hours they had worked, how much was coming, what the documents were and what the net amount to them was. They then wanted to know if they could have this amount but that he said they could not because of the assignment and some outstanding bills that had been presented to the defendant on their account. They then thanked him and left. They never, at any time, said anything about having a contract with the defendant for any specific period of time [p. 156],

nor was anything said about any incorrectness of the accounting furnished by the defendant [p. 157].

Plaintiff Farr was asked if he remembered having a conversation with Burch on the 9th of December in which Burch told him that the trucks were in such terrible condition he couldn't let them work. He answered, "Not that kind of a conversation." He was then asked to state in substance or effect what was said and the answer was, "I don't recall that." He was also asked "If it isn't a fact that at this conversation he (Farr) told him (Burch) that he would do some work on the trucks; that they had been standing around for several years; that everything had dried up, and that he was going to do some work on them," and Burch said something to the effect that, "Well, you better, if you want to work around here," to which the witness answered "No" [pp. 59-60]. He was then asked, "Isn't it a fact that about two days later he told you your trucks were in such bad condition that you were all through on the job," to which he answered, "Mr. Burch didn't say that." He was then asked, "Isn't it a fact that you then asked him if you fixed the trucks and got them back in good shape, could you go back to work?" The witness answered, "All that was with Mr. Wells." He then denied that he had that kind of a conversation with Mr. Wells or with Mr. Burch. He was then asked, "Isn't it a fact that when you asked him (Burch) if you could go back on the job and put the trucks back to work he said he would have to see Mr. Wells about it," to which he answered, "No, sir" [p. 60]. He was then asked, "It was about the end of that first week that Mr. Burch said 'If your trucks are in working condition you can try again,' " to which he answered "No" [p. 60].

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Plaintiff Sinclair denied that he had any conversation with Tucker or anyone else prior to his discharge as to the terms of the agreement with defendant and that January 18th about 2:30 p. m. was the first time that he knew they were through on the job [pp. 84, 93-94]. He denied that he had any conversation with anyone prior to the termination of the employment with regard to Eaton & Smith, but admitted that when he was notified of the termination of the employment, Tucker suggested Eaton & Smith to him [p. 197]. He denied that he had any conversation with Tucker or Burch in which he asked him how much longer they would last on the job [p. 198].

Plaintiff Sinclair admitted that after the termination of plaintiffs' employment he went over the accounts with Tucker who showed him an itemized list of all income and expenses and that he stated to Tucker that the account was substantially correct. He testified that he didn't remember whether any mention was made at that time of any contract between plaintiffs and defendant [p. 196].

(h) Prospective Profits.

Plaintiff Sinclair testified that the profit which they would have made had they continued in the employment of the defendant was 75¢ per truck per hour [pp. 85, 107], arriving at this figure by subtracting from $2.70 per truck working hour the following figures [pp. 86, 104, 107]:

Insurance (collision, property damage and public liability only)	$ .27	per	truck	per	hour
Parts	.42	"	"	"	"
Mechanics	.32	"	"	"	"
Gasoline and grease	.58	"	"	"	"
Down time	.36	"	"	"	"
Total	$1.95	"	"	"	"

He testified that the actual mechanics' salaries and compensation insurance on them for the period of December 9th to January 18th was $688.69 [pp. 101-102]. The trucks actually worked 672 hours during this time [p. 260]. Mathematically, therefore, the costs of mechanics and their compensation insurance equals slightly over $1.02 an hour, whereas in the above computation the amount is merely shown as 32¢ an hour. Moreover the computation does not include Social Security taxes [p. 107].

He testified that plaintiff spent $300.00 for parts, which amounts to almost 45¢ per hour and is exclusive of the balance of $716.39 which he testified was for permanent improvements [p. 103].

Plaintiffs did not testify as to the individual items in making up the total of collision, property damage and public liability insurance and as these amounts were actually paid by the plaintiffs, the defendant does not know of what they consist. However, inasmuch as the rest of the items in plaintiffs' statement are figures on the basis of each of the trucks working the full twenty-one hours per day, it is safe to assume that this item also is based upon the same supposition. Thus we may assume that the cost of this insurance per truck would have been 27¢ per hour had the trucks operated the full eighty-four hours per day. Inasmuch as they did not do so, the cost of this insurance per operated truck-hour increased in the proportion in which the trucks failed to operate for the full eighty-four hours per day.

He admitted that there was not included in this computation of expenses any allowance for depreciation on either the trucks or the tires [pp. 104-105], "Drivers' time compensation at eleven per cent—8979" [pp. 106-107], or any

allowance for the time of either plaintiff, which he testified was $1.25 per hour for each of them [pp. 102, 108].

He testified that in arriving at his figures he used the basis of each of the trucks working twenty-one hours per day, except that he allowed for breakdown time at the rate of twelve truck hours per day, whereas actually on the job it was 9% [pp. 109, 111].

Twenty-one hours per day for each of the four trucks for 17⅓ days amounts to 1456 hours. Actually the trucks only worked 672 hours during this time [pp. 259-260] or 46% of the total time.

The defendant submitted the computation of the actual costs of operation of the trucks as reflected by the books and records of the defendant as follows [Dft. Ex. A]:

"Cost of Operating Farr & Sinclair Trucks While Working for Macco Construction Co. at Bethlehem Steel Co., San Francisco, December, 1940 & January, 1941.

Income—per hour		2.70
Cost of Operation	Per Hour	Total Cost
Gas—2095 gals. @ .135	.447	282.83
Oil & Grease	.146	91.99
Drivers Comp.	.142	89.76
Non-Operating Drivers time & Insurance	.161	101.30
Mechanic & Ins.	1.062	670.95
Tires	.093	58.99
Parts paid by Macco	.044	27.98
Parts—Inv. direc to Farr & Sinclair, known bills	1.132	716.39
	3.227	
Net loss per operated hour		0.527

> No allowance in these costs for work performed by either Farr or Sinclair personally, nor for any money expended by them for parts, tires, nor for depreciation of truck or tires."

This computation, moreover, does not include any allowance for depreciation, except the cost of one tire actually purchased [p. 160], nor does it include the cost of Liability, Property Damage or Collision Insurance inasmuch as plaintiffs procured these coverages and they therefore did not appear upon the defendant's books.

The gross earnings for the trucks from December 9 to January 18 was $1708.42 [p. 165].

Plaintiffs, however, actually received nothing [pp. 55-84]. The Court will remember this was because of the assignment and because of the unpaid bills presented to the defendant.

(i) Subsequent Earnings.

Plaintiff Sinclair testified that following the termination of plaintiffs' work for defendant, he went to several contractors and attempted to find work for the trucks but was unsuccessful mainly because there were no other jobs going on, but subsequently they did find employment earning $500.00 between January 18th and April 16th [p. 94].

The trucks were subsequently repossessed by Young & Sons who sold them for $2000.00 [pp. 94-95], leaving a claimed balance due Young & Son of $1500.00 [pp. 121-122].

IV.

Specification of Errors.

The judgment in this case is contrary to the law because:

1. The evidence affirmatively shows that the plaintiffs are not entitled to any recovery in this case because of their failure to secure a permit from the Railroad Commission of the State of California.

2. The evidence fails to support the damages awarded to the plaintiffs.

3. The evidence affirmatively shows that even if the defendant did breach any contract with the plaintiffs, the latter did not lose any profits by reason thereof.

4. The evidence is insufficient to support the implied finding of the jury that the contract between plaintiffs and defendant was for any definite period of time or other than at the will of the defendant.

5. The evidence affirmatively established that if the contract originally was for a definite time, a novation occurred whereby that contract was terminated and a new hiring took place which new hiring was not for a definite period.

6. The evidence fails to support the implied finding of the jury that the defendant breached any existing contract between it and the plaintiffs.

7. The evidence affirmatively shows that the plaintiffs are not the proper parties plaintiff in interest in this action, but that they had assigned their entire right to any recovery herein to Young & Sons.

The Trial Court committed prejudicial error in:

1. Denying the motion of defendant to dismiss.

2. In denying the motion of the defendant under Rule 50B of the Federal Rules for the entry of judgment in its favor.

3. In refusing to enter judgment in its favor.

4. In denying the defendant's motion for a new trial.

The Trial Court committed prejudicial error in refusing to instruct the jury:

1. That before plaintiffs could recover they must show they were ready, able and willing to perform their contract at the time of its alleged breach by the defendant.

2. On the subject of the law of the State of California requiring a permit from the Railroad Commission of that state before property may be hauled by motor vehicles over any highway.

ARGUMENT.

V.

The Defendants Are Not Entitled to Recovery Because They Had Obtained No Permit From the Railroad Commission of the State of California.

The evidence conclusively establishes that whatever contract was entered into between the plaintiffs and defendant, it contemplated the transportation of property over the public streets. Plaintiff Sinclair made a belated effort to avoid this fact. Upon direct and cross-examination plaintiffs related their version of the conversations had with Mr. Wells, but failed to make any reference whatsoever to the question as to where the hauling was to be done. After the defendant made the point that the contract involved transportation over the public streets in violation of the City Carriers Act plaintiff, Sinclair, was recalled to the stand for redirect examination and then testified that Mr. Wells said the hauling job was to be on private property of the Bethlehem Compnay, and that they were going to put the dirt on barges to take to Alameda. The Court will remember that Mr. Wells' testimony was given by deposition, he being in Texas and, therefore, not available to contradict this testimony of plaintiff, Sinclair.

Not only was this testimony of the plaintiff, Sinclair, impeached by his previous testimony with regard to the conversations and subject to the greatest suspicion, because of the time at which it was given, but it is also impeached by the failure of the plaintiffs to call plaintiff, Farr, and question him upon the subject, though he was personally present in Court at the time, and was present at the conversation with Wells. The presumption is

that had plaintiff Farr testified on the subject, his testimony would have been adverse to plaintiffs' contentions. This is particularly true in view of his previous testimony as to his conversations with Mr. Wells. Again, there was no evidence that plaintiffs ever did haul to any barges. In addition, plaintiff Sinclair's testimony in itself is not sufficient to establish that hauling upon private property was a condition of the contract, and any such contention is completely negatived both by plaintiffs' own pleadings and by plaintiffs' conduct.

The attention of the Court is called to paragraph VI of plaintiffs' complaint in which it is expressly alleged that it was necessary for plaintiffs to expend moneys for licenses and permits to enable them to furnish their services and equipment to defendant [p. 4]. If only hauling on private property was contemplated by the contract, then there would have been no requirement for any licenses or permits, not even a motor vehicle license (California Vehicle Code, Sections 81, 250). This Court takes judicial notice of this situation:

> *Teplitsky v. Pennsylvania R. Co.*, 38 Fed. Supp. 535.

The attention of the Court is also called to the undisputed fact that the contract between the parties provided for payment at railroad commission rates, which is highly persuasive of the fact that the parties realized that the hauling to be done came within the jurisdiction of that commission, and therefore required a permit therefrom.

As we have said, shortly after the inception of the haulings plaintiffs commenced, without protest, to haul over the public streets and did so continuously thereafter. Their action in so doing amounts to a practical construc-

tion by them of the requirements of the contract, and is the strongest possible evidence as to what were the terms of that contract:

U. S. Trading v. Newmark G. Co., 56 Cal. App. 176, 183-184; 205 Pac. 29;

Hales v. Browning, 133 Cal. App. 618; 24 Pac. (2d) 546;

Preston v. Herming Haus, 211 Cal. 1, 11-12; 292 Pac. 953.

The *City Carriers Act, No. 5134, Deerings' General Laws of the State of California* (Stats. 1935, p. 1057, as amended Stats. 1937, p. 629) makes it unlawful for a carrier to engage in the business of transporting property over public highways without first having obtained a permit so to do, and imposes penalties for its violation.

Thus the Act provides in Section 3 thereof:

> "Except as hereinafter provided, no carrier shall engage in the business of transportation of property for compensation by motor vehicle over any public highway in any city in this State without having first obtained from the Railroad Commission a permit authorizing such operation."

Section 13 of the Act provides:

> "Any person or any director, officer, agent or employee of a corporation who shall violate any of the provisions of this act or of any operating permit issued hereunder to any carrier, or any order, rule or regulation of said commission, shall be guilty of a misdemeanor and, upon conviction thereof, be fined not more than five hundred dollars or imprisoned in the county jail for not more than three months, or both."

Section 15 of the Act provides:

> "Every violation of the provisions of this act or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense."

Section 16 of the Act provides:

> "In construing and enforcing the provisions of this act relating to penalties, the act, omission or failure of any officer, agent or employee of any person or corporation, acting within the scope of his official duties or employment, shall in every case be and be deemed to be the act, omission or failure of the employing person or corporation."

The rules of law are well settled in such cases:

1. Where a statute provides a penalty for an act, a contract founded on such act is void although the statute does not pronounce it void or expressly prohibit it:

> *City of Los Angeles v. Waterson,* 8 Cal. App. (2d) 331, 346; 48 Pac. (2d) 879;
>
> *Holm v. Bramwell,* 30 Cal. App. (2d) 332, 336; 67 Pac. (2d) 114;
>
> *Citizens, etc. v. Gentry,* 20 Cal. App. (2d) 332, 336; 67 Pac. (2d) 364.

2. If the statute makes the entering into the contract itself unlawful without a license or permit, then the contract is void *ab initio*:

> *Houston v. Williams,* 53 Cal. App. 267, 271; 200 Pac. 55;
>
> *Holm v. Bramwell,* 20 Cal. App. (2d) 332, 335; 67 Pac. (2d) 114.

3. If the doing of the act at all is unlawful, then the contract is void *ab initio* even though the parties entered into the contract in perfect good faith:

Hannah v. Steinman, 159 Cal. 142; 112 Pac. 1094;

Dunn v. Stegemann, 10 Cal. App. 38; 101 Pac. 25.

4. If a license or permit is required by the contracting party and he cannot obtain such license or permit, the contract is void *ab inito:*

Brashers v. Giannini, 131 Cal. App. 706; 22 Pac. (2d) 47.

5. If the statute merely makes the act to be done illegal unless a license or permit has been obtained, then the duty of obtaining such license or permit rests upon the person who is to do that act, and until such license or permit has been obtained the contract is inchoate. If the license or permit is not obtained, no actual contract ever comes into existence:

Smith v. Lunning Co., 111 Cal. 308, 310-311, 43 Pac. 967;

Schroeder v. Wheeler, 126 Cal. App. 367, 376, 14 Pac. (2d) 903;

Burke v. San Francisco Breweries Co., 21 Cal. App. 198, 202, 131 Pac. 83.

6. If a license or permit is obtained after entering into the contract, then recovery may not be had for acts performed before obtaining such license or permit, though recovery may be had for acts performed thereafter:

Gardner v. Tatum, 81 Cal. 370, 373-374, 22 Pac. 880.

7. Even if the one contracting to do the act has a license or permit when the contract is entered into, no recovery can be had if such license or permit had expired or was not in full force and effect when the act actually was done:

Wise v. Radis, 74 Cal. App. 765, 242 Pac. 90.

8. A contract which is lawful when made becomes inoperative if thereafter the doing of the act provided for becomes unlawful:

Industrial Development Co. v. Goldschmidt, 56 Cal. App. 507, 509, 206 Pac. 134.

9. An illegal contract cannot be ratified even by the acceptance of the benefits thereof:

Fewel & Davis, Inc. v. Pratt, 17 Cal. (2d) 85, 91-92, 109 Pac. (2d) 650;

Davis v. Chipman, 210 Cal. 609, 634, 292 Pac. 40;

Duntley v. Kagarise, 10 Ca. App. (2d) 394, 400, 52 Pac. (2d) 560.

10. The defense of illegality need not be pleaded. As soon as it appears that the doing of the act was or would be unlawful under the particular circumstances existing, such as the absence of a permit, the Court must deny any relief to the plaintiff:

Tatterson v. Kehrlein, 88 Cal. App. 34, 263 Pac. 285;

Payne v. DeVaughn, 77 Cal. App. 399, 246 Pac. 1069;

Napa Valley v. Calistoga, 38 Cal. App. 477, 176 Pac. 699.

11. The denial of relief to plaintiff under such circumstances is not founded upon any consideration for either of the parties to the lawsuit, but is based solely and squarely upon the fact that to permit any recovery by either party would be contrary to public policy:

Sheble v. Turner, 46 Cal. App. (2d) 764, 767, 116 Pac. (2d) 630;

Woods v. Kern County, 34 Cal. App. (2d) 468, 473, 93 Pac. (2d) 837;

Del Rey Realty Co. v. Fourl, 44 Cal. App. (2d) 399-402, 112 Pac. (2d) 649;

Fewel & Davis, Inc. v. Pratt, 17 Cal. (2d) 85, 91-92, 109 Pac. (2d) 650;

Duntley v. Kagarise, 10 Cal. App. (2d) 394, 400, 52 Pac. (2d) 560;

Davis v. Chipman, 210 Cal. 609, 624, 293 Pac. 40.

Since the evidence discloses without any conflict whatsoever that the plaintiffs did haul over the public streets, but that at no time did they hold a license or permit as required by the City Carriers Act, there can be no question, under the above authorities, but that any recovery upon their part should have been denied.

The defendants certainly understood that the hauling to be done by the plaintiffs did include hauling over public streets. In fact, after a very short period of time following the inception of the work, *all* of the hauling done and required of plaintiffs was over the public streets, and this hauling over such public streets constituted by far the greatest portion of the consideration to defendant for entering into the contract. If the plaintiffs did not understand the contract as contemplating such hauling over the

public streets, then the minds of the parties never met upon the terms of that supposed contract, and no actual contract between them ever came into existence.

Thus it is said in *American Can Co. v. Agricultural Co.,* 12 Cal. App. 133, 137, 106 Pac. 720:

> "A contract is an agreement to do, or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract."

For examples of cases in which it has been held that there had been no meeting of minds are:

Barfield v. Price 40 Cal. 535 (prior to Pacific Reporter);

Rovengno v. Defferari, 40 Cal. 459, 462-463 (prior to Pacific Reporter);

Muex v. Hogue, 91 Cal. 442, 448, 27 Pac. 744;

Harvey v. Duffey, 99 Cal. 401, 405, 33 Pac. 897;

German Savings Bank v. McLellan, 154 Cal. 710, 716, 99 Pac. 114.

However, even if contrary to the evidence in the case, it could be said that the parties knowingly entered into a contract for a definite period and for hauling over private property, nevertheless the evidence shows that subsequently either a novation took place or the contract was modified to require hauling over the public streets.

In California a novation of a contract may occur between the original parties and without the substitution and

addition of any new party. Thus it is provided in *Civil Code, Section 1530:*

> *"Novation, what.* Novation is the substitution of a new obligation for an existing one."

And in Civil Code, Section 1531, Subdivision 1:

> *"Modes of novation.* Novation is made:
>
> "1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation; * * *"

However, whether or not technically a "novation" occurred is immaterial since a modification of the contract has, under our California authorities, the same effect.

The following wording is used by the Court in the case of *Anderson v. Standard Lumber,* 64 Cal. App. 410, 416, 221 Pac. 686:

> "Even if the contract had been binding on defendant, nevertheless, when plaintiff, on his arrival, stated that he could not do the work for which he had been employed and agreed to do other work at a smaller salary, he thereby abandoned the first contract. It is not a question of the oral modification of a written contract, but an abandonment thereof and the substitution of the oral contract in its stead."

To the same effect see:

Sprague C. & M. Co. v. Western R. Corp., 29 Cal. App. 374, 155 Pac. 1017;

Murphy v. White, 101 Cal. App. 719, 282 Pac. 427;

DeLong v. Machine Marble Works, 95 Cal. App. 741, 273 Pac. 107;

Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093;

Barrett-Hix Co. v. Glas, 9 Cal. App. 471, 99 Pac. 856.

Remembering that the very trucks which formed the subject of the original contract between the parties were actually used by plaintiffs to haul over the public streets, plaintiffs cannot contend that at the very time of such hauling these same trucks should have been used solely on private property. *Proud v. Strain,* 11 Cal. App. 74, 77, 103 Pac. 949, 950, involved a contract for the sale of cabbage, which contract was subsequently modified. It was held that the plaintiff while acting under the modified contract could not claim that the original contract was still in force, the Court saying:

> "The new oral obligation created by the absolute sale of the cabbage to the defendant abrogated the commission contract, and evidence of the creation of the new contract is evidence of the waiver of all rights under the commission contract by defendant. He could not while making an absolute purchase of the cabbage say that the old contract was still in force as to the very cabbage which he was buying."

A novation or modification of a contract may be established just as well by conduct as by express oral or written agreement. Thus it is said in *Producers Fruit v. Goddard,* 75 Cal. App. 737, 755, 243 Pac. 686, 693:

> "Hence, upon the making of an oral agreement, the written contract of March 1, 1917, *ipso facto et eo instanti,* passed out of existence and became *functus officio.* And this proposition would still remain unimpeachable even where the statute of frauds had been successfully interposed against the enforcement of the terms of the new agreement itself. The question whether a novation has taken place is always one of intention (citing authorities), and where it satisfactorily appears that a new agreement was in-

> tended by the parties to take the place of an existing one, as clearly it was so made to appear here, since the parties proceeded to be and were for two years governed by the substituted agreement, then, as stated, it necessarily follows that the old agreement has been entirely abrogated or extinguished. (Citing authorities.)"

In the present case it is clearly made to appear that the parties from shortly after the inception of the work proceeded to be and were governed by the substituted agreement, namely, the agreement to haul over the public streets, and that any previous agreement had therefore been entirely abrogated and extinguished.

Again it is said in *Dunham-Corrigan-Hayden Co. v. Rubber Co.,* 84 Cal. App. 669, 673, 258 Pac. 663, 664:

> "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. (Citing authorities.)"

Again it is said in *Silva v. Providence Hospital,* 14 Cal. (2d) 762, 773, 97 Pac. (2d) 798, 804:

> "For example, conduct may form a basis for novation, though there is no express writing or agreement (citing authorities)."

In view of the above well established principles of law as announced by the courts of the State of California, and of the undisputed facts with regard to the hauling over the public highways of the City and County of San Francisco, plaintiffs are not and cannot be entitled to any recovery in this case and the judgment in their favor must be reversed.

VI.

Error in Refusing Instruction on Requirement for a Permit.

The defendant requested the Court to instruct the jury as follows [pp. 222-223]:

> You are instructed that the laws of the State of California in force and effect at the time of the transactions involved herein provided that no carrier should engage in the business of transportation of property for compensation by motor vehicle or truck over any public highway, road or street in any city in this State, without having first obtained from the Railroad Commission of the State of California, permit authorizing such operation. By the term "carrier" is meant any person or persons engaged in the transportation of property for compensation or hire by means of a motor vehicle or truck as a business on any public highway, road or street in any city or county in the State of California.
>
> You are therefore instructed that if you find that the plaintiffs, in entering into or performing the contract alleged in this case, engaged in the business of transportation of property for compensation by motor trucks over any such highway, road or street, but that they did not have such permit from the said Railroad Commission, during the time involved in this litigation, then said alleged contract was illegal and void, and plaintiffs cannot recover in this action and your verdict herein must be for the defendants.

The Court refused to give this instruction and we are certainly at a loss to understand its reasons for so doing.

The evidence was clear and uncontradicted that the defendants did haul property over the public highways of the State of California, and it was stipulated that they did not have a permit so to do from the Railroad Commission of that State. The Court gave no instruction whatsoever with regard to the law requiring such a permit or penalties for failing so to have, and without the requested instruction, or a similar one, the entire evidence in the case with regard to where the hauling was done and the absence of the permit must have been completely meaningless to the jury.

Under the authorities cited in the preceding subdivision of this brief, there can be no doubt that the failure of the Court to give the instruction constiututes reversible error.

VII.

The Amount of Damage Awarded to Plaintiffs Are Excessive Even According to Plaintiffs' Own Claims.

Plaintiffs predicate their claim of loss on the premise that each truck made a profit of 75¢ an hour and contend that if they had been allowed to operate them to the completion of the work they would have made certain profits. The evidence shows that up to the 18th day of January, 1941, there were 17-1/3 job days computed on the basis of 21 hours per day; that the total number of job days from the beginning to the final completion of the work was equivalent to approximately 55-1/6 days, plus the equivalent of 3 days of cleanup work after the big shovels

had moved out. Of this total time plaintiffs had worked 17-1/3 days, and substracting this from 55-1/6 days of 21 hours each, or a total of just under 798 hours of actual work after the termination of plaintiffs' contract. Even taking plaintiffs' own figures of 75¢ per operated hour of profit per truck, or $3.00 per hour for the four trucks, and applying that to the total remaining time of the work, that is assuming for that purpose that the trucks worked every minute of the remaining time, this profit would only come to the sum of $2394.00 for all four trucks. Subtracting from this sum the amount of $500.00 which plaintiffs admittedly made during the remainder of the period, leaves an absolute maximum of $1894.00, beyond which under no possible circumstances can recovery be justified.

VIII.

The Evidence Affirmatively Shows That Even If Plaintiffs' Employment Had Not Been Terminated They Would Have Made No Profit.

We have just considered the figures presented by the plaintiffs themselves. They are, however, obviously incorrect and not supported by the evidence. Thus, it is uncontradicted that during the time that the plaintiffs were hauling on the job, their trucks only worked 47% of the total job time and of course plaintiffs were only to be paid for the time that their trucks actually worked. Still using the figure of 75¢ an hour, 47% of the remaining hours worked would have resulted in a *gross* profit of $1125.18, which, again allowing the credit of $500.00 otherwise earned by plaintiff, leaves a balance of $625.18.

The plaintiffs in arriving at the sum of 75¢ an hour profit in many instances used arbitrary figures. Their computation was:

Mechanic's time	.32 an hour
Public Liability, Property Damage and Collision Insurance	.27 " "
Parts	.42 " "
Gas and Oil	.58 " "
Down time	.36 " "
Total	$1.95

This computation made by plaintiffs themselves does not include Compensation Insurance on the drivers, which admittedly amounted to 14.2¢ per hour [Defts. Ex. "A," p. 224; Sinclair, p. 106], or Compensation Insurance on the mechanics amounting to 3.52¢ per hour (using same basis for computation), or social security and unemployment insurance, the employer's share of which, under the law, amounted to 3.7% of wages paid, or 5.25¢ per hour on the driver and 1.18¢ per hour on the mechanics. These make an additional fixed expense of 24¢ per hour and increase plaintiffs' figure from $1.95 to $2.19 per hour.

The above, however, is still exclusive of depreciation on trucks and tires for which a very reasonable allowance would be 20¢ per hour, increasing plaintiffs' hourly expense to $2.39 and reducing plaintiffs' profit, by taking into consideration the above known factors, to 31¢ per hour, still exclusive of plaintiffs' own time which they figured at $1.25 per hour for the full twenty-one hours a day, license fees and other sundry expenses.

The Court will note that in the above computation made by plaintiffs, mechanics' time is listed at 32¢ per hour.

Plaintiff Sinclair testified that the mechanics were paid $9.00 per shift and that there were three shifts per day, making a total payment to mechanics of $27.00 a day [p. 111]. Had the trucks worked the full 84 hours per day, the cost of these mechanics would, therefore, be the exact figure set forth in plaintiffs' computation, namely, 32¢ an hour, but as we have previously pointed out, the trucks did not in fact work the full 84 hours a day working only 47% of that time. Since the mechanics were necessarily employed for the full time irrespective of the actual operation of the trucks, their cost per operated truck hour would necessarily increase from 32¢ per hour to 68¢ per hour.

The same also applies to Compensation Insurance, Social Security and Unemployment Insurance on the mechanics and to the items of Public Liability, Property Damage, Collision Insurance and to Parts.

Change plaintiffs' computation to include these indisputable items and the revised computation is as follows:

Mechanics' Time	$ .68	an hour
Mechanics' Compensation Insurance	.0725	" "
Mechanics' Social Security	.0243	" "
Public Liability, Property Damage and Collision Insurance	.57	" "
Parts	.89	" "
Gas and Oil	.58	" "
Down Time	.36	" "
Drivers' Compensation Insurance	.14	" "
Drivers' Social Security	.0525	" "
Total	$3.369	

Plaintiffs' costs of operation was, therefore, greater than their gross revenue of $2.70 an hour, and this is so without considering depreciation on trucks or tires, plaintiffs' own time, license fees, etc.

That this computation is not purely theoretical is shown by computation based upon actual experience with these very trucks on this particular job. Defendant's Exhibit "A" represents only actual amounts definitely appearing on defendant's records and is as follows:

"Cost of Operating Farr & Sinclair Trucks While Working for Macco Construction Co. at Bethlehem Steel Co., San Francisco, December, 1940 & January, 1941.

Income—per hour		2.70
Cost of Operation	Per Hour	Total Cost
Gas—2095 gals. @ .135	.447	282.83
Oil & Grease	.146	81.99
Drivers Comp.	.142	89.76
Non-Operating Drivers time & insurance	.161	101.30
Mechanic & Ins.	1.062	670.95
Tires	.093	58.99
Parts paid by Macco	.044	27.98
Parts—Inv. direct to Farr & Sinclair, known bills	1.132	716.39
	3.227	
Net loss per operated hour		0.527

No allowance in these costs for work performed by either Farr or Sinclair personally, nor for any money expended by them for parts, tires, nor for depreciation of truck or tires."

It will be noted that this shows an operating cost of $3.227 per hour, or a net loss of $0.527 per hour. As this computation was made solely on the basis of actual expenditures known to the defendant, it is by no means all inclusive, thus it did not take into consideration the liability, property damage and collision insurance carried by plaintiffs, and only took into consideration the cost of one tire that was purchased during this time by defendant for plaintiffs.

Therefore, without taking into consideration the cost of public liability, property damage and collision insurance and other bills which may have been incurred, of which the defendant has no knowledge, it is undisputed in the evidence that the operations conducted by plaintiffs up to January 18th were such that the known bills and expenses exceeded the amount earned by approximately $500.00.

Certainly the above facts and figures furnish no basis whatsoever for the allowance of future prospective profits to be derived from the operation of the old and defective trucks being used by plaintiffs, and certainly does not support any award to plaintiffs of such prospective profits.

We submit that it is perfectly obvious that in awarding plaintiffs $2500.00 in damages, the jury were merely endeavoring to provide a fund approximating the total outstanding bills against the plaintiffs and out of which plaintiffs' creditors could be paid. In this connection the attention of the Court is called to the remarkable question asked by the jury during their deliberations, which question was as follows, namely [p. 220]:

> "Can Young & Sons secure a deficiency judgment for $1500.00 on any sum allowed the plaintiff?"

We submit that even if the plaintiffs had established in this case that the defendant breached its contract with them and that the contract was one upon which they could recover, the evidence in this case clearly shows that, having suffered no loss of profits thereby, they were not entitled to any award of damages.

IX.

The Contract Was Not for Any Definite Period of Time.

According to both plaintiffs, they had a preliminary conversation with Mr. Wells with reference to obtaining employment with the defendant. They testified that at this conversation they asked how long the job would last and Wells said four months. Plaintiff Farr, however, testified that Wells not only said that the job would last four months but also that it would last 120 working days. The extreme improbability of his having made any such statement is shown by the fact that the defendant was required by its contract to complete the job in approximately four calendar months during the rainy season and including Sundays and holidays. Obviously there would not be 120 working days. Again the undisputed evidence shows that in fact there were only 55-1/3 working days. It is inconceivable that Wells could be so far out in his estimate of the working time required on the job or that plaintiffs would not have known that any such estimate was far too high.

Plaintiff Sinclair positively testified that Wells not only assured them that their trucks would work the whole four months but also that when the job was over plaintiffs could follow the defendant around as it did many jobs

all over the coast. If Wells made this statement and it was the basis for the subsequent agreement, then plaintiffs were not employed for the particular job as alleged in their complaint and claimed by them, but were employed permanently from then on. Plaintiffs cannot arbitrarily take one portion of a statement and use it as the basis of a contract and at the same time ignore another portion of that same statement.

It is perfectly obvious that if Wells ever made any such statement, which Wells emphatically denied, he merely did so as an expression of his opinion that there would be sufficient work for plaintiffs so that their services would continue to be needed not only on the particular job but on subsequent jobs. It is equally obvious that plaintiffs so understood such statements, if made, and in fact so understand them at the present time since they make no claim to have been permanently employed by the defendant.

Again if the statement was actually made by Wells and did form a part of the later contract, since the whole of that statement must be considered, it would be a contract for employment extending over more than a year and, not being in writing, would be unenforceable under the Statute of Frauds.

That plaintiffs account of this conversation is not reliable is clearly shown by the fact that plaintiff Farr testified that they asked Wells how long the job would last and he said four months or 120 working days, but that *nothing else was said in reference to plaintiffs' employment* except that Wells said the equipment sounded interesting and that plaintiffs would be welcome to go to work for defendant on another job after the Bethlehem Steel job was over. It will be noted that Farr not only did not testify that

Wells "assured" them that the trucks would work the whole four months, but in fact his testimony definitely negatived any such statement having been made by Wells.

It is inconceivable that if it were to be an actual term contract, that plaintiffs were to be employed for the entire four months, Farr would have so completely forgotten it as to positively testify that nothing was said with reference thereto. Farr's testimony on the point clearly shows that either Sinclair was mistaken in his testimony that Wells made any statement as to the length of their employment, or else that, if such statements were made they were not considered by the plaintiffs as of any particular importance, or as anything more than Wells' opinion as to the amount of work to be done on the job.

That Sinclair could be mistaken in his testimony is demonstrated beyond doubt by the fact that at one place he testified that in this conversation Wells said that the defendant's trucks were going to be in San Diego and that was why he was glad to get plaintiffs' trucks and asked them if they knew any one else who had any trucks, while at another place he testified that at this conversation Wells stated that he would *probably* be interested in renting plaintiffs' trucks as soon as he learned whether or not the defendant's trucks were going to San Diego. Obviously Sinclair was mistaken as to Wells having made one or the other of these statements.

However, both plaintiffs admit that no contract was entered into at this conversation, and that in fact they saw

Wells twice more before he finally told them that they were hired.

The subsequent conduct of the parties again clearly demonstrates that the hiring was not for any definite period, nor for the length of the job. Thus, when the defendant was asked to sign a guarantee of payment to Young & Sons, it positively refused to do so and was only willing to accept an assignment made to Young & Sons upon the distinct understanding and agreement that it was only obligated to make payment out of moneys to become due and payable from them to plaintiffs and not otherwise, and that it would not guarantee that any payments in fact would become due to plaintiffs.

Again when the defendant terminated the contract the plaintiffs admit that they made no protest whatsoever. Not only did they make no protest but they came in and went over their accounts with the defendant and specifically OK'd these accounts and asked for payment of the balance shown to be due them. They admit that even then they made no protest on account of the termination of their employment and made no claim that they should have been permitted to continue working for the defendant.

We submit that the evidence entirely fails to support the implied finding of the jury that the plaintiffs were hired for any definite period of time or other than at the will of the defendant.

X.

Novation.

Even if the original contract had been for the length of the job, the evidence clearly shows that a novation occurred.

As we have previously shown, if the contract originally was merely for the hauling of property on private property a novation must have taken place since in fact practically all of the hauling was done over the public highways.

Admittedly when the trucks reported for work on December 9th they were not in a condition to do the work and were laid off for some time. Defendant's Foreman Burch, testified that on December 9th he had a conversation with either plaintiffs Farr or Sinclair, but he thought it was Farr, in which he (Burch) told the plaintiff that the trucks were not in shape and that the defendant couldn't use them in the condition they were in. While plaintiff Sinclair denied any such conversation, all the plaintiff Farr testified in connection therewith was, "I don't recall that." Burch testified that the plaintiffs then said that they were going to work on the trucks and would try to get them in shape. Again Sinclair denied any such conversation, but all Farr denied was that he had a conversation in which he told Burch that the trucks had been standing around for several years and that everything had dried up, and that he was going to do some work on them. This is not a denial of the conver-

sation as related by Burch. Burch further testified that a day or two later he had another conversation with one of the plaintiffs in which he was asked when he was going to let them go back to work, and that he told them he didn't know and he didn't think they were going to work any more for the defendant because they were all done. Farr does not deny this conversation.

Reconciling the testimony of the three witnesses as we should do where it is possible, it appears that Burch did tell Farr that the trucks were not in shape and that the defendant couldn't use them in the condition they were in; that Farr said he was going to work on the trucks and try and get them in shape; that a day or two later he asked Burch when he was going to let the plaintiffs go back to work; that Burch told them that he didn't know and he didn't think they were going to work any more because they were all done; and that thereafter Farr asked to be allowed to come back on the job and Wells told him he might try again.

It is quite apparent from the foregoing that even if the original contract had been for a definite period of time, it was terminated by mutual consent when, at the start of the job, plaintiffs' trucks were not in a condition to work, and that thereafter a new employment took place, this new employment being entirely tentative and depending upon the then condition of the trucks and without any provision as to the length of such employment.

XI.

Even Had There Been a Contract for a Definite Time, the Defendant Was Justified in Terminating It.

While there was a conflict in the evidence as to the condition of the trucks, nevertheless the plaintiffs themselves, by their own admissions showed that the trucks were old, second-hand trucks not in good condition and not suitable for the work for which they were employed.

However, one salient fact stands out in this connection, and of itself conclusively proves the unserviceability of the plaintiffs' trucks despite any evidence to the contrary given by the plaintiffs and their witness Thiel. During the period plaintiffs' trucks were on the job they only worked 47% of the time, yet according to the plaintiffs themselves, the defendant was badly in need of trucking service and even had asked them if they knew where it could obtain additional trucks. It is uncontradicted in the evidence that the failure of the plaintiffs' trucks to be able to operate delayed all the operations of the defendant who, it will be remembered, was under contract to complete the job by a specified date.

Under these circumstances we submit that the defendant, no matter what were the terms of the original contract as to its duration, was not only entirely justified, but in self protection was obligated to terminate plaintiffs' employment and thus be able to proceed with its work without the delays caused it by the constant breaking down of plaintiffs' equipment.

XII.

The Court Erred in Refusing to Instruct the Jury Before Plaintiffs Could Recover They Must Show That They Were Ready, Able and Willing to Perform the Contract.

The very least that can be said from the evidence is, that the jury might have found that plaintiffs' equipment was in such bad condition that they were not either ready or able to perform their contract with the defendant. If the jury had so found, then under the most elementary principles of law they were not entitled to recover from the defendant even if the latter breached the contract.

The defendant was undoubtedly entitled to have the jury instructed under the evidence of this case upon this principle of law. Under the instructions to the jury as given by the Court, the plaintiffs would have been entitled to recover if they established that the contract was for the entire period of the job irrespective of the condition of their equipment and irrespective of their ability to do the hauling required under that contract.

In view of the not only persuasive but conclusive evidence that plaintiffs' equipment was not capable of doing the work required by the contract, the failure of the Court to instruct the jury that this fact would bar the plaintiffs from recovery cannot be considered as other than highly prejudicial to the defendant. The error of the trial court in refusing to give this instruction itself requires a reversal of the judgment.

XIII.

Effect of Assignment to Young & Co. Ltd.

As we have previously shown in this brief, even under their own figures, the maximum which the plaintiffs could have recovered was less than $2000.00. Actually they were awarded $2500.00. Both of these sums are less than the amount of the submitted assignment to Young & Co. Ltd., intervenor in this case. The action should therefore have been instituted by Young & Co. Ltd.

XIV.

Conclusion.

We submit that the judgment in this case must be reversed because of the failure of the evidence to establish that any contract for any definite period was ever entered into between the parties; because of the excessiveness of the judgment; because of the errors of the trial court in refusing to give the two instructions set forth in this brief; and because the plaintiffs were not the real parties in interest.

We further submit that because on a new trial no different showing could possibly be made, the judgment of the trial court should not only be reversed, but should be reversed with instructions to enter a judgment in favor of the defendant as the evidence affirmatively shows that plaintiffs failed to obtain a permit from the Railroad Commission of the State of California and because it establishes that they suffered no damages whatsoever by reason of the termination of their employment.

Respectfully submitted,

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